

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of

Review of Regulatory Requirements for  
Incumbent LEC Broadband  
Telecommunications Services

CC Docket No. 01-337

**Reply Comments of the  
Information Technology Association of America**

The Information Technology Association of America (“ITAA”) hereby replies to the comments filed in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION**

In its initial comments, ITAA demonstrated that:

- A distinct market exists for broadband mass-market wireline telecommunications services, such as DSL, provided to Internet service providers (“ISPs”) that serve residential and small business customers.
- The Incumbent Local Exchange Carriers (“ILECs”), which provide an estimated 93 percent of all DSL lines, are plainly dominant in that market.
- The ILECs continue to have the incentive to use their position in the market for wholesale mass-market broadband telecommunications services in order to reduce competition in the broadband Internet access services market.

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<sup>1</sup>*Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) (“*Notice*”).

In light of these facts, ITAA concluded, the Commission should not reclassify the ILECs as non-dominant or eliminate existing competitive safeguards applicable to the ILECs' provision of wholesale mass-market broadband telecommunications services.

The ILECs' comments do not refute ITAA's conclusions. Indeed, two of the surviving Bell Operating Companies ("BOCs") – Verizon and BellSouth – have simply chosen to ignore the question of whether there is a separate wholesale mass-market broadband telecommunications services market. The two other BOCs' efforts to deny the existence of this market, or to argue that the ILECs lack market power in the market, are entirely unconvincing.

#### **I. A DISTINCT MARKET EXISTS FOR WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES**

In the *Notice*, the Commission asked "whether, within the general product market[] for . . . mass-market customers, . . . [it] should distinguish between retail markets and wholesale markets."<sup>2</sup> In its comments, ITAA explained that, consistent with established precedent, "the Commission should recognize the existence of a separate market for wholesale broadband services, such as DSL-based services, that an ILEC provides to an ISP for use in providing a broadband information service to residential and small business customers."<sup>3</sup> Qwest is the only one of the BOCs to directly address this question. Neither of the arguments that it advances, however, has any merit.

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<sup>2</sup> *Notice* ¶ 24.

<sup>3</sup> Comments of the Information Technology Association of America, CC Docket No. 01-337, at 3 (filed Mar. 1, 2002) ("ITAA Comments").

**A. The Wholesale Broadband Telecommunications Services That ISPs Purchase Differ From the Bundled Services Purchased by Retail Customers**

Qwest first contends that the Commission should not define a separate market for wholesale mass-market broadband telecommunications services because “the broadband services purchased [by ISPs] on a wholesale basis typically consist of precisely the same broadband services that consumers purchase, albeit at larger volumes and therefore at discounted prices.”<sup>4</sup>

Qwest’s assertion is demonstrably incorrect. As an initial matter, the Commission has previously concluded that it would be appropriate to define a separate market where a class of customers purchases the same type of telecommunications service as other customers, but does so in significantly greater volumes.<sup>5</sup> In any case, as ITAA explained in its comments, the broadband services purchased by ISPs that seek to serve the mass market differ significantly from the broadband services bought by residential and small business customers. ISPs generally purchase unbundled broadband telecommunications services, typically ADSL, from ILECs. By contrast, residential and small business customers typically buy broadband transport bundled with Internet access. Indeed, as ITAA noted, “in many cases, the ILECs do not even offer a stand-alone broadband telecommunications service to their residential and small business customers.”<sup>6</sup>

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<sup>4</sup> Comments of Qwest Communications Int’l, Inc., CC Docket No. 01-337, at 21 (filed Mar. 1, 2002) (“Qwest Comments”).

<sup>5</sup> See *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18041 (1998).

<sup>6</sup> ITAA Comments at 4 n.9 (citing *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Svcs., Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20737-38 & *id.* at 20884-85 (2001) (separate statement of Commissioner Abernathy)).

**B. The Commission's Decision Not to Define a Separate Wholesale Market in the *AOL Time Warner Merger Order* is Irrelevant**

Qwest next asserts that, in the *AOL Time Warner Merger Review Order*, the Commission declined to define a separate market for broadband services sold to ISPs.<sup>7</sup> While this is correct, it is entirely irrelevant. The Commission has long recognized that “delineating all relevant product markets would be administratively burdensome.”<sup>8</sup> Therefore, it has typically defined broad service markets. The Commission has made clear, however, that it will define a narrower market when “credible evidence suggesting that there is or could be a lack of competitive performance with respect to a particular service or group of services.”<sup>9</sup> Indeed, in the very same footnote in the *AOL Time Warner Order* on which Qwest relies, the Commission recognized that it is “particularly appropriate to revisit issues of market definition . . . as the factual predicates underlying a market definition in one proceeding may no longer be valid at the time of another proceeding.”<sup>10</sup>

In the present proceeding, ITAA and other parties have provided “credible evidence” that the BOCs’ significant position in the downstream market for retail mass-market broadband Internet access services provides a strong incentive for them to engage in anti-competitive conduct in the provision of wholesale mass-market broadband telecommunications services to

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<sup>7</sup> Qwest Comments at 22.

<sup>8</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 12 FCC Red 15756, 15777 (1997) (“*LEC Interexchange Non-Dominance Order*”).

<sup>9</sup> *Id.* at 15777-78.

<sup>10</sup> *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc. Transferee*, Memorandum Opinion and Order, 16 FCC Red 6547, 6574-75 n.202 (2001).

rival ISPs.<sup>11</sup> This evidence, which the BOCs do not even attempt to address, makes it appropriate – and, indeed, essential – for the Commission to define a separate market for wholesale mass-market broadband telecommunications services in the present proceeding.

## **II. THE ILECs RETAIN SIGNIFICANT MARKET POWER IN THE MARKET FOR WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES**

In the *Notice*, the Commission correctly observed that one indication of market power is the ability of a carrier “to raise prices by increasing its rivals’ costs or by restricting its rivals’ output through the carrier’s control of an essential input . . . that its rivals need to offer their services.”<sup>12</sup> In its comments, ITAA explained that ILECs plainly have the ability to do just that. Nothing in the BOCs’ comments undercuts this conclusion.

### **A. ISPs Generally Cannot Obtain Wholesale Broadband Transmission Services from Cable or Other Providers**

Qwest and SBC seek to find wholesale competition where none exists. SBC’s analysis comes down to little more than the bald assertion that “[t]here is no need for government intervention or regulation of wholesale broadband services . . . [because] no company has bottleneck control over broadband access to the Internet.”<sup>13</sup> Qwest adds that wholesale services “can be” provided by cable operators, “some . . . [of which] are reluctantly coming round [sic] to offering or agreeing to offer some degree of access to unaffiliated ISPs” and that wireless and satellite provides also are “capable of providing such services.”<sup>14</sup>

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<sup>11</sup> See, e.g., ITAA Comments at 6-8; Comments of WorldCom, Inc., CC Docket No. 01-337, at 10-11 (filed Mar. 1, 2002).

<sup>12</sup> *Notice* ¶ 28.

<sup>13</sup> Comments of SBC Communications Inc., CC Docket No. 01-337, at 29-30 (filed Mar. 1, 2002) (“SBC Comments”).

<sup>14</sup> Qwest Comments at 21.

The fact that wholesale mass-market broadband services “can be” provided by cable or wireless providers is irrelevant. The dispositive question is whether, if faced with an increase in price or a reduction in quality in the provision of wholesale mass-market broadband telecommunications services by an ILEC, a non-carrier ISP *actually* could obtain an alternate source of supply from cable or wireless providers. At the present time, the answer, quite clearly, is no.

The comments of EarthLink, a non-carrier-affiliated ISP with nearly a half million broadband Internet access subscribers, vividly demonstrate the extent of the ILECs’ market power in the market for wholesale broadband services. EarthLink notes that, while it has been able to negotiate an agreement with AOL Time Warner that allows subscribers to access EarthLink’s Internet access service over Time Warner’s cable networks, “there are today no cable operators other than Time Warner Cable even offering any type of commercial arrangement to EarthLink (or other unaffiliated ISPs) and its customers.”<sup>15</sup> As a result, EarthLink – like other ISPs – lacks the ability to use the cable infrastructure to access directly nearly 85 percent of the subscribers who obtain broadband Internet access over cable.<sup>16</sup> In those markets, therefore, ISPs remain almost totally dependent on the ILECs to provide broadband transport service.

There is little reason to expect this situation to change. The Commission has recently issued a declaratory ruling in its *Cable Internet Inquiry*, in which it found that cable modem

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<sup>15</sup> Comments of EarthLink, Inc., CC Docket No. 01-337, at 10 (filed Mar. 1, 2002) (“EarthLink Comments”). The Commission has reached the same conclusion. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, ¶ 49 (rel. Mar. 15, 2002) (“*Cable Internet Declaratory Ruling*”) (“[M]ost cable operators currently provide only one brand of cable modem service on any system.”).

<sup>16</sup> See EarthLink Comments at 10.

service does not contain a telecommunications component that must be unbundled and offered to the public on non-discriminatory prices, terms, and conditions.<sup>17</sup> As a result, as Commissioner Abernathy has observed, “some cable operators may continue to offer consumers only a single brand of ISP service or that cable operators generally may offer only two or three options.”<sup>18</sup>

Because ISPs have few, if any, sources other than the ILECs from which they can obtain wholesale mass-market broadband telecommunications services, there can be little doubt that the ILECs have the ability to exercise significant market power.

**B. Competition in the Broadband Internet Access Service Market Does Not Constrain the ILECs’ Ability to Act Anti-Competitively in the Wholesale Market**

Recycling an argument previously made by SBC, Qwest asserts that the ILECs do not have market power in the market for wholesale mass-market broadband telecommunications services because “the prices of the underlying broadband services . . . provided on a wholesale basis to ISPs [] are constrained by the price elasticity of demand . . . for the end product.”<sup>19</sup> Neither SBC nor Qwest has bothered to describe the application of this theory to the relevant markets. Apparently, however, the two BOCs’ position is that, because the market for broadband Internet access service is competitive, the ILECs cannot raise the price for broadband telecommunications services used to provide that service because, if they tried to do so, ISPs would shift to other (less costly) suppliers in order to be able to continue to provide a competitively priced retail Internet access service.

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<sup>17</sup> See *Cable Internet Declaratory Ruling* ¶¶ 42-43.

<sup>18</sup> *Id.* at 71 (separate statement of Commissioner Abernathy).

<sup>19</sup> Qwest Comments at 22 (*citing* Declaration of Robert Crandall and Gregory Sidak ¶ 39, attached to *SBC Petition for Expedited Ruling That It Is Non-Dominant In Its Provision of Advanced Services and For Forbearance From Dominant Carrier Regulation of Those Services* (filed Oct. 3, 2001)).

The Commission's decision, of course, cannot be driven by academic theories. Rather, it must reflect the realities of the relevant markets. The simple reality is that – notwithstanding competition in the broadband Internet access market – ILECs have the ability and the incentive to charge above-cost prices for wholesale DSL service.

In the absence of rate regulation, an ILEC could rationally charge significantly above-cost prices for wholesale DSL service in order to subject non-affiliated ISPs to a price squeeze. If the ILEC were to do so, its downstream ISP could absorb the increased cost and, therefore, continue to offer a competitively priced Internet access service.<sup>20</sup> By contrast, non-carrier-affiliated broadband ISPs – which have few, if any, alternative sources of supply<sup>21</sup> – would have no choice but to pass the higher DSL costs on to their customers. This, in turn, would encourage many of the non-carrier-affiliated broadband ISPs' customers to switch to the lower-priced service provided by the ILEC's affiliated ISP. Over time, this would be likely to force many non-carrier-affiliated broadband ISPs to exit the market.

Because competition in the Internet access market is imperfect, once the ILEC drove non-carrier-affiliate ISPs out of the market, it would be able to raise the price of its basic Internet access service. In some markets, consumers would have no alternate provider of broadband Internet access services.<sup>22</sup> While consumers in other markets might have the option of switching

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<sup>20</sup> Because the ILEC's telecommunications and Internet access service operations are part of the same economic entity, any "deficit" incurred by the ISP's Internet access operations would be offset by the "surplus" enjoyed by the ILEC's telecommunications operations.

<sup>21</sup> See ITAA Comments at 8-15. Nor could an ISP feasibly deploy its own telecommunications facilities. To do so, the ISP would have to engage in time-consuming and expensive negotiations to obtain permission to install in residential and multi-tenant buildings. The Commission could reduce this problem by exercising its authority, under Section 224 of the Communications Act, to adopt regulations governing access conduits, rights-of-way, ducts, and poles owned or controlled by the ILECs. See *National Cable Telecommunications Association v. Gulf Power*, 534 U.S. \_\_\_, 122 S. Ct. 782, 152 L.Ed. 2d 794 (2002).

<sup>22</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844, 2943 (2002).



to a cable-based Internet access service, many would be deterred from doing so as a result of long-term contracts signed with the ILEC or because of the investment they had made in DSL premises-based equipment.<sup>23</sup>

In light of the above, it is clear that the existence of competition in the broadband Internet access market does not adequately constrain the ILECs' ability to exercise market power in the market for wholesale mass-market broadband telecommunications services.

### **III. THE COMMISSION SHOULD NOT DECLARE THE ILECs NON-DOMINANT IN THE PROVISION OF WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES**

In the final section of the *Notice*, the Commission asked whether to reclassify the ILECs as non-dominant in the provision of broadband telecommunications services and, if so, "what regulatory requirements, if any, should govern the [ILECs'] provision of broadband services."<sup>24</sup> As ITAA demonstrated in its initial comments, because the ILECs continue to have the ability and incentive to discriminate in the provision of wholesale mass-market broadband telecommunications services, it would not be appropriate to reclassify them as non-dominant or to eliminate existing regulations applicable to these services.

The ILECs seek to divert attention from the need for continued regulation by invoking the concept of "competitive neutrality" and "regulatory parity."<sup>25</sup> While the Commission should seek to eliminate arbitrary distinctions among service providers, it must not lose sight of the fact that – under existing law – telecommunications common carriers and cable system operators have different legal obligations. Common carriers alone are required to provide non-

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<sup>23</sup> See EarthLink Comments at 16-17.

<sup>24</sup> *Notice* ¶ 33.

<sup>25</sup> See SBC Comments at 30 ("Any wholesale regulation of DSL service must apply equally to competing broadband platforms, including cable modem service.").

discriminatory access to the telecommunications functionality necessary to offer information services.<sup>26</sup> Over time, market forces may well provide sufficient incentives for cable and wireless service providers to offer wholesale mass-market broadband transport services.<sup>27</sup> Until they do, however, the ILECs will retain the ability and incentive to act anti-competitively in the wholesale mass-market broadband telecommunications services market – thereby threatening competition in the broadband Internet access market. The Commission should not eliminate regulation necessary to limit the ILECs' ability to do so.

### **CONCLUSION**

For the foregoing reasons, as well as those set forth in ITAA's initial comments, the Commission should continue to classify ILECs as dominant in the provision of wholesale mass-market broadband telecommunications services. Rather than eliminating existing regulations, the Commission should take action to promote competitive entry by Data CLECs, while enforcing the applicable competitive safeguards governing the information services market.

Respectfully submitted,

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<sup>26</sup> 47 U.S.C. § 202. As ITAA will discuss in greater detail in its comments in the *Wireline Broadband Internet Access* docket (CC Docket No. 02-33), this obligation is imposed by Section 202 of the Communications Act and by the Commission's *Computer Rules*.

<sup>27</sup> ITAA welcomes recent announcements by certain cable system operators that they will take actions to increase the ability of their subscribers to obtain service from non-affiliated ISPs.